

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**HELEN CUSHENBERRY**

Claimant

VS.

**WAL-MART**

Respondent

AND

**NATIONAL UNION FIRE INSURANCE  
COMPANY OF NEW YORK**

Insurance Carrier

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Docket No. 199,674

**ORDER**

Respondent appeals from a decision by Administrative Law Judge (ALJ) Jon L. Frobish to deny respondent's request for a nunc pro tunc order changing the effective date of a review and modification award entered by the ALJ pursuant to K.S.A. 44-528(d). The ALJ'S Order is not dated but was stamped as filed February 10, 1997. Respondent's application for review was filed February 19, 1997.

**APPEARANCES**

Claimant appeared by her attorney, Dennis L. Phelps of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Michael D. Streit of Wichita, Kansas.

**ISSUES**

Respondent lists the following issues:

- (1) Whether ALJ Frobish exceeded his jurisdiction in initially granting claimant's request for an application for review and modification.
- (2) Whether ALJ Frobish exceeded his jurisdiction in denying the request for an award nunc pro tunc.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Appeals Board first finds that the only timely appeal is from the Order denying the request for an award nunc pro tunc. The appeal from the review and modification award was filed more than ten days after the Administrative Law Judge's Award and must, therefore, be dismissed. K.S.A. 1996 Supp. 44-551. The Appeals Board also concludes that the Administrative Law Judge did not exceed his jurisdiction or otherwise commit error in denying the request for an award nunc pro tunc.

On August 8, 1996, the ALJ issued an award which claimant appealed to this Board. While the appeal was pending, claimant filed an application for review and modification. On December 13, 1996, before the appeal was decided by the Appeals Board, the ALJ issued an Award of Review and Modification. The Award of Review and Modification increased the disability and made the modification effective as of the date of accident. Respondent contends the ALJ erred by making the change effective as of the date of accident and asserts the modification should be effective no more than six months prior to the application for review and modification. Respondent filed a motion for an award nunc pro tunc requesting that the Award of Review and Modification be modified as to the effective date of the modification. The ALJ issued an Order denying that request for an award nunc pro tunc, and respondent filed the present appeal.

The application for review by the Appeals Board was filed more than ten days from the initial Award of Review and Modification. The application was filed on February 19, 1997, and the Award of Review and Modification was entered December 13, 1996. The appeal was in time as an appeal from the Order denying the request for an award nunc pro tunc. Accordingly, the only issue before the Appeals Board is the propriety of the decision on the request for an award nunc pro tunc. The issues respondent raises regarding the initial review and modification, including whether appropriate while the appeal was pending, are not properly before the Board.

As above noted, the respondent contends the ALJ exceeded his jurisdiction in denying the request for an award nunc pro tunc. The Appeals Board has de novo review of the decision and does not look solely to determine whether the decision exceeded the

ALJ's jurisdiction. The Board must determine whether the decision was the correct decision.

As claimant points out in her brief, there are no provisions in the Workers Compensation Act which permit a motion for rehearing. See Waln v. Clarkson Constr. Co., 18 Kan. App. 2d 729 (1993). In addition, a nunc pro tunc order cannot be used to alter a judgment actually rendered. Norcross v. Pickrell Drilling Co., 202 Kan. 524, 449 P.2d 569 (1969). The ALJ reaffirmed his original decision in his response to the request for a nunc pro tunc. The Appeals Board, therefore, concludes that the original effective date of the Award of Review and Modification was not a clerical error which could be corrected by an award nunc pro tunc. Accordingly, the request for a nunc pro tunc order must be denied, and the decision by the ALJ must be affirmed.

**AWARD**

**WHEREFORE**, the Appeals Board finds that the Order entered by ALJ Jon L. Frobish denying the request for an award nunc pro tunc should be, and is hereby, affirmed. The Award of Review and Modification remains in effect as originally entered.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS  
Michael D. Streit, Wichita, KS  
Jon L. Frobish, ALJ  
Philip S. Harness, Director